No. 3123

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

CHRIS BETSCH and JOE L. JEAN,
Appellants,

vs.

FRED UMPHREY and FRED HARRISON,
Appellees.

BRIEF FOR APPELLANTS.

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Statement of the Case.

This is a suit involving the title and ownership of a certain placer mining claim described as Creek Placer Mining Claim No. 5, Above Discovery on the west fork of Willow Creek, a tributary of Spruce Creek, a tributary of the Yukon River, in the Wade Hampton recording district, Territory of Alaska.

The plaintiffs in the court below (the appellees herein), claim the placer ground in controversy in their complaint (Tr. pp. 1, 2, 3, 4, 5, 6 and 7), by reason of a certain alleged placer location made by one of the plaintiffs on the first day of April, 1917, by virtue of a discovery of gold and the staking of

the placer ground, and a subsequent filing for record of a certificate of location of said ground, and further allege that by reason of said placer location so made on the first day of April, 1917, they are entitled to the possession and in the possession of the placer ground.

The appellees' complaint was verified on the 11th day of April, 1917 (Tr. p. 7), just eleven days after the alleged location was made and said complaint was thereafter filed in the office of the clerk of the District Court at Nome, Alaska, on the 3rd day of May, 1917 (Tr. p. 8). The summons and complaint in the suit were served on the defendants, respectively, on the 15th and 18th days of June, 1917, as shown by the marshal's return (Tr. p. 9).

Thereafter and on the 27th day of August, 1917, the defendants in the court below (the appellants herein), filed their answer to the appellees' complaint (Tr. pp. 10, 11 and 12), wherein they denied each and every material allegation contained in the appellees' complaint and affirmatively plead that they were the owners in fee of the mining ground and premises described in appellees' complaint, and that they were in the possession and entitled to the possession of the whole thereof.

Subsequently on the 22nd day of September, 1917, without issue being joined, Mr. Fred Harrison, one of the appellees, who is an attorney at law and of record in the case as attorney for plaintiffs in the court below (Tr. p. 17), appeared in open court and asked that said case be set for trial. There-

upon, Mr. O. D. Cochran, who was in the court room, opposed the setting of said case for trial until he could have time to secure the attendance of witnesses on behalf of the appellants and until he could secure the attendance of the appellants who resided at Marshall, Alaska, some six hundred miles distant. Thereupon, Mr. Cochran moved for judgment on the pleadings for failure on the part of the appellees to file their reply to the answer of appellants and on the ground that said case was not at issue. Immediately thereafter Mr. Harrison filed a reply for the appellees and issue was joined in said cause. The court thereupon set the case for trial before the court at the hour of 2 o'clock P. M. on the same day, September 22nd, 1917, over the objection of Mr. Cochran on behalf of appellants (Tr. pp. 18, 23 and 24).

When the court convened at the hour of 2 o'clock in the afternoon of September 22nd, 1917, Mr. Cochran, on behalf of the appellants, filed a written motion for a postponement of the trial (Tr. p. 21) until such time as he could inform his clients and bring them and their witnesses to Nome from said town of Marshall. In support of the written motion, Mr. Cochran filed his own affidavit (Tr. pp. 22, 23, 24, 25 and 26), wherein he set up the facts that said cause had just been brought to issue on that morning and had not been called up for assignment in accordance with the regular rules of court; that his clients, the appellants herein, lived at the town of Marshall or Fortuna Lodge in the

Wade Hampton Precinct, Territory of Alaska, on the Yukon River, about six hundred miles distant from the town of Nome; that the means of travel from said town of Marshall to Nome is by river steamboat, coming down the Yukon River to St. Michaels and by ocean vessel from St. Michaels to Nome; that the steamboats plying up and down the Yukon River are irregular, and vessels from said St. Michaels to Nome are also irregular and that it would require from ten days to three weeks time under the usual conditions of travel prevailing, to get his clients and witnesses to Nome to attend the trial; that in the two hours elapsing between the time of setting the case and the hour of going to trial it was physically impossible for the appellants to be present or to have their witnesses present to take part in the trial; that between the hour of 11 o'clock in the morning and 2 o'clock, the hour set for said trial, no subpoenas had been issued for the witnesses because it was physically impossible to serve the witnesses who lived at such a great distance from Nome; that owing to the short time between the time of setting said trial and the hour for the trial it was physically impossible for the attorney for appellants to make any defense to the action; that his clients had a good and substantial defense to the cause of action set out in appellees' complaint; that the property involved in the suit was of the value of several thousand dollars; that he had no other witnesses to prove his defense other than his clients and those witnesses whom they

would bring from Marshall; that by his clients and their witnesses they expected to prove that they were in the actual possession of the premises described in the appellees' complaint upon the date of the commencement of the action and that the plaintiffs, nor either of them, were in the possession of the same upon the date of the commencement of the action; that during the year 1916, the defendants expended upon said placer mining claim in working and operating the same, several thousand dollars; that the appellants were ever since and long before the first day of January, 1917, and upon the date the appellees claim to have located the premises described in their complaint, in the actual possession of the whole of said placer mining claim with the boundaries distinctly marked, and that the premises were not open for location upon the date that the appellees claim to have located the same; that his clients, the appellants, are the owners of the placer mining claim by reason of valid mining location.

After the motion and affidavit were read and argued, the court denied the appellants' motion for a postponement of the trial and immediately began the trial of said cause. Whereupon, the appellees through Mr. Harrison, as their attorney, read to the court the complaint, answer and reply (Tr. p. 19), and orally moved the court for a judgment in favor of the appellees upon the pleadings, which said motion for judgment upon the pleadings was by the court and over the objection of the attorney

for appellants, allowed, and thereafter on the same day at the hour of 5 o'clock (Tr. pp. 19 and 20), over the objection of the attorney for appellants, the trial court made its findings of fact and conclusions of law and entered a written judgment (Tr. pp. 14, 15 and 16) in favor of the appellees and against the appellants for the ownership and possession of said placer mining claim and enjoined the defendants from interfering with the plaintiffs' use and possession.

Specifications of Error.

1. The court erred and abused its discretion in making its order of the 22nd day of September, 1917, setting the trial of said action for the hour of 2 o'clock in the afternoon of said day and without giving appellants or their witnesses an opportunity to be present at said time fixed and set by the court for the trial thereof (Assignment of Error No. 1).

2. The court erred and abused its discretion in overruling and denying the motion of the appellants to postpone the trial of said action (Assignment of Error No. 2).

3. The court erred in granting the motion of the appellees for judgment in favor of the appellees upon the pleadings filed in said cause, and directing the judgment entered in favor of the appellees upon said pleadings, over the objections of the appellants (Assignment of Error No. 3).

4. The court erred in making, signing and filing its final decree in favor of the appellees and against the appellants, over the objections and exceptions of the appellants (Assignment of Error No. 4).

Argument and Authorities.

The record in this case is very short and easily comprehended. The property involved, however, according to the record is a valuable mining claim in the Wade Hampton mining precinct on the Yukon River in Alaska. Enough facts are shown in the transcript to show the court that the appellants were the owners of the placer claim and had been mining it on a large scale, expending several thousand dollars on the claim in the year 1916; that the appellees on the first day of April, 1917, attempted to make a location of the same claim, recording their location certificate on the 2nd day of April and on the same day one of the plaintiffs, Umphrey, transferred an undivided half interest in the location to the other plaintiff, Fred Harrison. Thereafter, nine days later, on the 11th of April, without hardly waiting until their location got cold, they commenced this action by verifying their complaint and sending it to the clerk's office at Nome, where it was filed on the 3rd day of May. This will give the court a fair idea of the time it takes to travel between the distant town of Marshall on the Yukon River and the Town of Nome. After the case was docketed on the 3rd day of May, the papers

were sent back to Marshall for service on the defendants and according to the United States marshal's return, the summons and complaint were not served until the 15th and 18th days of June, or nearly a month and a half after the date of docketing the case. The transcript shows that the only means of communication between the two towns are by river steamer from Marshall to St. Michaels, which is slow and irregular and by ocean steamer from St. Mitchaels across to Nome, also an irregular mode of travel.

After preliminary motions had been disposed of, the record shows the defendants served and filed their answer on the 27th day of August, 1917. Nothing further was done in the matter until a month later when on the 22nd day of September, one of the plaintiffs, Mr. Fred Harrison, who was the attorney of record in the case for himself and his co-plaintiff, appeared in open court before he had filed any reply to bring the case to issue, and orally requested the court to set the cause for trial. The transcript shows that Mr. Cochran was present in court and called the court's attention (Tr. p. 18), to rule 37 of the District Court, for the District of Alaska, governing the assignment of causes for trial. For some unknown reason, not disclosed in the transcript, the trial court totally ignored the rule and further ignored the request of Mr. Cochran for a reasonable date for the trial and promptly set the case for trial less than three hours away at the hurried hour of 2 o'clock in the afternoon of the same day.

At the time the court fixed the hour of trial for 2 o'clock for that day, the court was informed of the fact that Mr. Cochran's clients and his witnesses were more than six hundred miles distant from the court and could not possibly attend the trial. Notwithstanding these facts, the court arbitrarily set the cause for trial for 2 o'clock of September 22nd. The record shows that when the court convened at the hour of 2 o'clock, Mr. Cochran presented a written motion, supported by his own written affidavit, setting forth in detail the history of the case and requesting a reasonable postponement of the trial for three weeks until he could get his clients and their witnesses to Nome to attend the trial. This motion was arbitrarily and promptly overruled and denied by the court, and the trial of the cause was ordered begun by the court. Mr. Harrison, then on behalf of his clients, read the complaint, answer and reply and orally moved the court for a judgment on the pleadings which the court promptly granted over the objection of Mr. Cochran for the appellants.

We submit there is not the slightest reason given anywhere in the transcript for such arbitrary and unjust rulings made by the trial court in this cause. The court certainly abused its discretion, first, in making the order contrary to the rule of the District Court, setting the cause for trial less than three hours away when fully informed of the predicament of appellant's counsel in not having his clients and witnesses in Nome and in not having any

opportunity or any reason for having them in Nome, as the cause had not been theretofore set for trial, and second, in overruling and denying appellants' motion to postpone the trial.

The court also erred first, in granting the motion of the appellees for judgment in favor of the appellees upon the pleadings and, second, in making and filing its final decree in favor of the appellees and against the appellants.

ABUSE OF DISCRETION.

(Assignments of Error Nos. 1 and 2.)

When we speak of discretion here, we have in mind a judicial discretion which measures right from wrong, giving justice between litigants rather than injustice, and not a capricious exercise of judicial power to oppress a litigant. The record shows that on September 22nd, 1917, the case was not at issue. It was not called up for setting according to the usual rules of the trial court. Prior to that date it was impossible for appellants to get out subpoenas or to leave their usual occupations and places of abode at the town of Marshall on the Yukon River to come to Nome. The question of due or reasonable diligence on the part of the appellants was not involved, for they had no way of knowing when their case would be called or set for trial prior to September 22nd. It was a most unusual, unjust, arbitrary and capricious ruling to say the least.

With the title, ownership and right of possession of a very valuable Alaskan placer mining claim involved, the trial court at the noon hour, set the case for trial at 2 o'clock in the afternoon of the same day with the appellants and their witnesses six hundred miles away and no previous notice or warning that the oral motion would be made on behalf of the appellees for setting the case on that day. It amounted to the denial of the use of subpoena. Such an abuse of judicial discretion is rarely found in the books!

> "It is a general rule that the granting or refusing of a motion for continuance is in the sound discretion of the trial court; and that an appellate court will not interfere with the exercise of this discretion unless the action of the trial court is plainly erroneous and is a clear abuse of its discretion. However, the discretion of the trial court in this respect is not an arbitrary, but a judicial, discretion, governed and controlled by legal rules, and to be exercised with a view to the manifest rights of the parties and the prevention of injustice and oppression, and in this sense it is subject to revision. It has been stated that, where a continuance is a matter of common right, a disregard of the right by refusing a continuance would constitute an abuse of discretion."
>
> 13 Corpus Juris, p. 125.

> "The absence of witnesses or evidence is the most usual ground on which a motion for a continuance is based, and whether or not a continuance shall be allowed on this ground is very largely in the discretion of the court. However, it is commonly regarded as error, or as frequently stated, an abuse of discretion,

to deny a continuance when the application complies with every requirement of the law and is not made merely for delay."

13 Corpus Juris, 149;

Lord v. Dunster, 79 Cal. 477 (21 Pac. 865);

Linn County v. Morris (Or.), 69 Pac. 297;

Betts Spring Co. v. Jardine Mach. Co., 139 Pac. 657.

This latter case is a California case and the court held that it was an abuse of discretion in the trial court to refuse a continuance where the showing was undisputed that the defendant was out of the country for his health, but would return in two months and was the only witness to prove his case.

This view is amply supported by the following cases:

Jaffe v. Lilienthal, 35 Pac. 636;

McMahan v. Norick, 69 Pac. 1047;

Storer v. Heitfeld et al., 105 Pac. 55.

The application for the continuance by appellants between the morning and afternoon sessions of the court was timely and the only opportunity they had for presenting a motion for continuance after objecting to the time of trial.

9 Cyc., 134;

6 R. C. L. 562.

"Where there has been a very capricious exercise of power or a very flagrant case of injustice, the appellate court will intervene."

9 Cyc., 147;

Watts v. Cohn, 40 Ark. 114;

10 Cent. Dig. tit. "Continuance", Sec. 141.

"The general rule is that, while the power of a court to grant or refuse a continuance is a discretionary power, this discretion is to be exercised in a sound and legal manner and not arbitrarily or capriciously."

6 R. C. L. 546;

Notes: 67 Am. Dec. 639;

74 Am. Dec. 141.

"A court cannot, therefore, refuse a continuance where the ends of justice clearly require it; but if an abuse of discretion clearly appears, its ruling will be reversed."

6 R. C. L. 546.

"To guard against bad faith and unwarranted delays, however, the following requirements have been established: (1) The expected testimony must be competent and material; (2) it must not be merely cumulative as impeaching; (3) it must be creditable and there must be a probability that it will affect the result; (4) There must be a probability that the testimony can be obtained at a future trial; and (5) due diligence must have been exercised to secure the attendance of the absent witnesses. The action of the lower court will not be interfered with unless these requirements are met, but if all these appear and the application is not made for purposes of delay it is an abuse of discretion to deny the motion."

6 R. C. L. 556.

The Compiled Laws of Alaska permit the court in its discretion, to postpone a trial on the ground of the absence of witnesses.

Sec. 1001 of the Compiled Laws of Alaska, page 425, provides as follows:

> "A motion to postpone a trial on the ground of the absence of evidence shall only be made upon affidavit showing the materiality of the evidence expected to be obtained, and a statement of facts showing that due diligence has been used to procure it, and also the name and residence of the witness or witnesses. The court may also require the moving party to state upon affidavit, the evidence which he expects to obtain, and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial shall not be postponed. The court, when it allows the motion, may impose such conditions or terms upon the moving party as may be just."

We submit the court exercised its authority erroneously and abused its judicial discretion in not postponing the trial until such a date that the defendants could reach the place of trial with their witnesses.

ERROR IN GRANTING JUDGMENT ON PLEADINGS.

(Assignments of Error Nos. 3 and 4.)

All the material allegations of the complaint are denied in the answer. The location, discovery of gold, staking and marking the boundaries, and the possession of plaintiffs, are all denied specifically. On the other hand, the appellants affirmatively plead possession and ownership of the mining ground in controversy in themselves. Notwithstanding these issues, the trial court without listening to a syllable of evidence in support of the contested

issues, promptly gave the appellees a judgment on the pleadings. About the only comment one is led to make in reflecting on the rulings of the court, is that the trial court was consistent in its arbitrary and unjust rulings all that day in the case. The appellees seemed to think because they alleged in their complaint the filing of the affidavit by William Delbar which was admitted by the answer, that this entitled them to a judgment on the pleadings. They relied upon Chapter 10, Session Laws of Alaska, 1915, which act provided for the filing of an affidavit of proof of annual assessment work not later than ninety days after the close of the calendar year in which the work was done.

Even if we admit for the sake of argument, that such a law was valid and constitutional, before the appellees were entitled to a judgment for the title and possession of the ground in controversy, they must prove by competent evidence that they made a location including discovery of gold, the marking of boundaries, etc., before the appellants had filed the affidavit of proof of annual assessment work, as the same law provides that such may be done. We contend, however, that the allegation in the complaint of the filing of the affidavit by William Delbar on behalf of the appellants was wholly immaterial so far as deciding or determining this appeal is concerned. The trial court in order to give and grant the appellees a judgment on the pleadings, found, without any evidence, that the appellees made a discovery of gold, marked the boundaries of

the claim with stakes and that they were in possession of the same. All of these matters were denied in the answer and were issues that could only be substantiated or proven by evidence.

A judgment on the pleadings will not stand where there is a material issue of fact joined or tendered. This is the universal rule of the courts in determining whether or not error has been committed in granting a judgment on the pleadings in any case.

> "This is a form of judgment not infrequently used in practice under the Reform Codes of Procedure. It is rendered on motion of plaintiff, when the answer admits or leaves undecided all the material facts stated in the complaint. But such a judgment cannot be given where the pleadings of the defendants set up a substantial and issuable defense."
>
> 23 Cyc., 769.

This doctrine is supported by the following authorities:

> Prost v. Moore, 40 Cal. 347;
>
> Alspaugh v. Reid, 55 Pac. 300;
>
> Parker v. Des Moines Life Association, 78 N. W. 826;
>
> Lewis v. Foard, 17 S. E. 9;
>
> Lough v. Thornton, 17 Minn. 253;
>
> Nelson v. Grondahl, 96 N. W. 299.

> "In determining the right of a party to a judgment on the pleadings, the real question to be determined is the sufficiency of the admitted facts to warrant the judgment rendered, and the materiality of those upon which issue is joined. A motion for judgment on the plead-

> ings, based on the facts thereby conceded, cannot be sustained, except where, under such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced. In other words, it cannot be sustained unless under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. Where issue is joined upon a single material proposition a judgment on the pleadings is improper."
>
> 15 Ruling Case Law, Sec. 13, p. 579.

Also in support see

> Mills v. Hart, 52 Pac. 68;
>
> Norris v. Lilly, 82 Pac. 425.

> "A motion by one party for judgment upon the pleadings after issue is joined will be denied if his adversary's pleadings are sufficient in substance to sustain a judgment in his favor."
>
> Rice v. Bush, 16 Colorado 484;
>
> Iba v. Central Association (Wyo.), 40 Pac. 527.

A judgment on the pleadings is only proper in cases where the pleadings are insufficient to sustain a different judgment, notwithstanding any evidence which might be produced. Judgment on the pleadings cannot, however, be properly rendered where the answer denies any material allegation of the complaint.

The above general doctrine is supported by the following authorities:

> Martin v. Porter, 84 Cal. 476;
>
> Johnson v. Manning, 2 Idaho, 1074;

Doyal v. Landis, 119 Ind. 479;
McCrea v. Leavenworth, 46 Kan. 747;
Floyd v. Johnson, 17 Mont. 469;
McCready v. Dennis, 85 Pac. 531;
Floyd v. Ballantine, 45 N. Y. S. 809; 20 Misc. Rep. 141;
Willis v. Holmes, 28 Or. 265;
Laubach v. Myers, 147 Pa. St. 447;
Raymond v. Morrison, 9 Wash. 156;
Jones v. Rowley, 73 Fed. 286.

"Where, in an action to quiet title an affirmative defense in defendant's answer, and also his cross-complaint, set up title in him and constitute a complete defense to plaintiffs' claim, the fact that defendant's denials are insufficient does not entitle plaintiff to judgment on the pleadings."

McCroskey v. Mills, 75 Pac. 910.

"It is error to render judgment for plaintiff on the pleadings where material allegations of the petition are denied by answer."

Haworth v. Newell, 71 N. W. 404; 102 Ia. 541;
For further cases see Am. Dec. Dig., Sec. 345, p. 610.

In conclusion we submit that the transcript in this case shows conclusively that the trial court capriciously abused its judicial discretion in denying the appellants a reasonable time to reach Nome to attend the trial of their case. We further contend that the court unjustly erred in granting the

appellees a judgment on the pleadings which ousted the appellants from possession of their valuable mining claim and enjoined them from interfering with the free use and possession of the claim by appellees. It was an arbitrary, unjust and capricious abuse of judicial power, oppressively used against the appellants.

We submit the judgment of the lower court should be reversed and the cause remanded to the trial court with instructions to set the cause for trial on its merits at such a reasonable time that the parties may appear and have their day in court.

Respectfully submitted,

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